Supreme Court, U. S.
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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

v.

VIOLET JO EVANS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS DECEASED, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI

To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas

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QUESTION PRESENTED

Is the Due Process Clause of the 14th Amendment violated by the entry of an order striking all pleadings and defenses following notice and hearing on a motion not seeking such relief?

LIST OF PARTIES

Petitioner—Southern Pacific Transportation Company.

Respondent—Violet Jo Evans, Individually and as Temporary Administratrix of the Estate of Paul David Evans, Deceased, and as the legal and personal representative of all beneficiaries, including herself as the surviving wife of Paul David Evans, Deceased, and Sandra Coker, Janice Cain, Paul David Evans, Jr., and Brenda Evans.

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OPINION BELOW

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, rendered on October 25, 1979, is reported in 590 S.W.2d 515.

JURISDICTION

The judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas was entered on October 25, 1979. The Court of Civil Appeals denied Petitioner's Motion for Rehearing on November 29, 1979. The Supreme Court of Texas "refused, no reversible error," Petitioner's Application for Writ of Error on May 28, 1980, and overruled Petitioner's Motion for Rehearing on June 25, 1980, making final the decision of the Court of Civil Appeals.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3), because a right specially set up and claimed under the United States Constitution is asserted by Petitioner herein.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of the 14th Amendment, which provides in pertinent part as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This lawsuit was filed by Respondents in a state district court of Harris County, Texas. During the pre-trial stage of this case, Petitioner failed to file timely answers to interrogatories. Respondent filed a Motion to Compel

Answers to Interrogatories, and on September 2, 1977, the district court entered an order granting that motion (App. B). That order required Petitioner to answer Respondent's interrogatories within thirty days, and further ordered that if Petitioner failed to file answers to interrogatories by such date, "the pleadings of [Petitioner] shall be struck and [Petitioner] shall not be permitted to present any grounds of defense . . ." (App. B). On March 31, 1978, Petitioner filed its answers to interrogatories.

On November 27, 1978, months after the answering of the interrogatories and after the completion of substantial other pretrial discovery, Petitioner's motion to set aside the order of September 2, 1977, was set down for hearing. That motion was the only motion set to be heard at that hearing, and Petitioner had no notice that any other motion was scheduled to be considered at that hearing. In particular, there was no notice that any motion filed on behalf of Respondent seeking the imposition of sanctions against Petitioner was set to be heard at the November 27, 1978 hearing. The district court overruled Petitioner's motion. However, in addition to overruling that motion, the order entered by the district court went on to state that "[Petitioner's] pleadings in this cause are struck and [Petitioner] shall not be permitted to present any grounds of defense in this cause." (App. C).

Throughout the time period during which the interrogatories were unanswered, Petitioner's counsel of record was experiencing severe psychiatric problems. A psychiatrist by whom said counsel was treated diagnosed those problems as depression, a recognized psychiatric condition that includes as one of its symptoms the failure to carry out tasks which an individual is responsible for perform-

ing. It is Petitioner's contention that the cause of its failure to answer the interrogatories within the time prescribed by the September 2 order was its counsel's mental condition during that period.

Had Respondent filed a motion for sanctions to be heard at the November 27, 1978 hearing, Petitioner would have been obliged under Texas law to present evidence concerning the condition of its counsel and the relation of such condition to its failure to answer the interrogatories. That obligation would have been imposed by Rule 168 of the Texas Rules of Civil Procedure, which provides that "except for good cause shown" discovery sanctions may be imposed upon a party which fails to serve answers to interrogatories. Rule 168 also provides that such sanctions may only be imposed "on motion and notice." In the absence of a motion on behalf of Respondent set to be heard at the November 27 hearing, Petitioner had no notice that it was being called upon to make a good cause showing and adduce evidence concerning its counsel's condition.

The first stage in the proceedings at which Petitioner raised its claim of no notice was at a hearing conducted on November 29, 1978, in the district court's chambers in which Petitioner asserted that it had no notice that a motion seeking the imposition of sanctions was set for the November 27 hearing and that the only motion set to be heard was Petitioner's motion. (The transcript of this assertion is at pp. 3-5 of Exhibit E to Defendant's Motion for Reconsideration, which is a part of the appellate record in this case.) The district court nonetheless entered its order striking Petitioner's pleadings (App. C). Petitioner next raised this complaint in Point of Error No. 3 in its brief in the Court of Civil Appeals, where

Petitioner stated that "the district court erred and abused its discretion in entering the order of November 29, 1978, in which it ruled that [Petitioner's] pleadings 'are struck and [Petitioner] shall not be permitted to present any grounds of defense.'" In its Motion for Rehearing in the Court of Civil Appeals, Petitioner again raised its complaint regarding failure to receive notice and a violation of the Due Process Clause. The Court of Civil Appeals affirmed the judgment of the district court and overruled Petitioner's Motion for Rehearing. Petitioner also raised this contention at pp. 10-13 of its Application for Writ of Error in the Supreme Court of Texas, pp. 6-14 of Petitioner's Reply to Respondent's Reply to Application for Writ of Error, and pp. 3-9 of Petitioner's Motion for Rehearing of Application for Writ of Error. The Supreme Court of Texas refused Petitioner's Application for Writ of Error, and overruled Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

It is by now well settled law that the Due Process Clause of the 14th Amendment applies to state judicial action. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680 (1930). It is equally well settled that the Due Process Clause imposes in state civil litigation certain minimum procedural prerequisites as a part of procedural due process, including principally notice and the opportunity to be heard. *Fuentes v. Shevin,* 407 U.S. 57 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975). The instant case squarely affords this Court the opportunity to decide the nature and content of the hearing and notice which must be provided in a civil action prior to the entry of a default judgment or its equivalent. Are the notice and hearing

guaranteed by the Due Process Clause constitutionally required to have a reasonable nexus with the matters actually adjudicated?

In the instant case, after a hearing on the motion of Petitioner to vacate an order later adjudged void (*see* p. 11, *infra*), the trial court, without additional notice or hearing of any kind, entered an order striking all pleadings and defenses of Petitioner—in effect defaulting Petitioner as to liability. Given the absence of any pending motion seeking such extraordinary relief and scheduled to be heard at the time of the hearing preceding the court's order, Petitioner was deprived of any opportunity to show why its interrogatory answers had been unduly delayed. If given the opportunity, Petitioner would have adduced evidence at the hearing that its counsel, a long-time and respected member of the bar, had, unknown to it, experienced severe psychiatric problems which precluded his day-to-day functioning; that the interrogatories were answered when the problem was discovered (long prior to the entry of the default order); and that Respondent was not prejudiced by the delay.

While the Court in recent years has spoken on numerous occasions to the necessity for procedural due process, including notice and hearing, it has seldom, if ever, articulated the nature of the notice and hearing required. *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970); *Boddie v. Connecticut*, 401 U.S. 371 (1971). And it has never done so in recent years in the most familiar and generally applicable context of state civil litigation, as opposed to more arcane and limited areas such as welfare benefits, parole revocation or provisional pretrial remedies.

In the instant case, although notice and hearing occurred prior to the November 28, 1978 order, they bore

no relationship to the extraordinary order entered and afforded neither notifcation sufficient to prevent unfair surprise nor an opportunity to be heard or to present evidence with respect to such order on the issues relating thereto. *Compare Aetna Ins. Co. v. Hartshorn,* 477 F.2d 97 (5th Cir. 1973).

Because the only motion set to be heard on November 27 was Petitioner's motion to set aside the September 2, 1977 order, there were, so far as Petitioner was aware, only two possible outcomes to the hearing on Petitioner's motion—(1) the court could have granted the motion, thus setting aside the portion of the September 2, 1977 order containing language regarding the future imposition of sanctions; or (2) the court could have overruled the motion, thus allowing the September 2, 1977 order to remain in existence with whatever effect, if any, that order may have had. However, the order actually entered by the court did not merely overrule Petitioner's motion. Instead, the court went on to effectively impose upon Petitioner the discovery sanctions of striking Petitioner's pleadings and precluding Petitioner from presenting any grounds of defense.

In the absence of a motion seeking the imposition of sanctions and in the absence of notice that such a motion was to be heard on November 27, Petitioner was unaware of any necessity that it make the "good cause" showing required by Tex. R. Civ. P. 168 to explain its failure to answer the interrogatories. Armed with such notice, Petitioner could have made a good cause showing by establishing that the failure to answer the interrogatories was caused by the incapacity of Petitioner's attorney of

record at the time in question. This was an altogether different showing from what was necessary for Petitioner to prevail on its motion to set aside the September 2, 1977 order, as that motion essentially went only to the legal validity of the September 2 order.

Although implicit in this Court's decisions, the Court has never expressly stated that the notice and hearing due under the 14th Amendment must expressly, fairly and reasonably offer the opportunity to be notified as to the issues to be adjudicated and the relief at issue. As Justice Jackson recognized in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 313, 314 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case . . . [The] right to be heard has little reality or worth unless one is informed that the matter is pending. . . .

A basic principle of justice is ". . . that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *New York v. New York, N. H. & H. R. R.*, 344 U.S. 294, 297 (1953). And the opportunity to be heard ". . . is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Unless the hearing and notice due under procedural due process are required to embrace sufficient notification to avoid unfair surprise and reasonable opportunity to respond with respect to the issues actually adjudicated

and relief sought, then procedural due process is a hollow shell without meaning, easily circumvented through avoidance of any reasonable nexus between the matter actually adjudicated and the form engaged in. In the instant case, the trial court may have "considered the events which had occurred from the beginning of the suit until that date," 590 S.W.2d at 518, but, if it did so, it did so without opportunity to Petitioner to present controverting facts or even know that it was engaged in such consideration. Under such circumstances, its adjudication was in violation of the 14th Amendment since due process of law requires "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." *Ex Parte Wall,* 107 U.S. 265 (1885).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF CIVIL APPEALS

NO. 17427

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant

v.

VIOLET JO EVANS INDIVIDUALLY & TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED,
Appellee

On Appeal from the District Court of
Harris County

Southern Pacific Transportation Company appeals from orders of the trial court striking its pleadings, refusing to allow it to present any ground of defense, and granting a default judgment against it as to liability.

The issue in the case is whether the entry and enforcement of these orders constituted an abuse of discretion by the trial court.

Paul David Evans, an employee of appellant, was killed on April 18, 1976, when a motorcar in which he was riding derailed. There were no witnesses to this incident. In May of 1977, suit was filed, alleging, among other things, that the motorcar was defective.

On June 21, 1977, interrogatories were served on appellant, pertaining to the accident and the motorcar. Appellant neither answered the interrogatories within the time required nor objected to them. On July 18, appellee filed a motion to compel answers to these interrogatories. On August 22, a hearing was held and although notified, appellant did not appear. On September 2, the court signed an order requiring appellant to answer the interrogatories within thirty days. The order further provided that the pleading of appellant would be stricken and that it would not be allowed to present any ground of defense if it failed to answer the interrogatories within thirty days. Appellant did not answer the interrogatories, file a motion to extend time, or file any objection to them.

Pursuant to notice, appellee, on November 18, 1977, attempted to take the deposition of Norris Hastings, appellant's claim agent. On the advice of counsel, Mr. Hastings refused to answer many questions pertaining to the motorcar. On March 31, 1978, appellant answered certain of the interrogatories propounded by appellee on June 21, 1977. One of the answers stated that the motorcar had been dismantled and salvaged for spare parts.

On July 31, 1978, appellant's motion to set aside the order striking its pleadings and appellee's motion for interlocutory default judgment were set for hearing and were taken under advisement. On November 29, the court overruled appellant's motion to set aside and ordered the pleadings stricken. On December 4, the court granted appellee's motion for interlocutory default judgment. On December 11, after a hearing, the court entered an order denying appellant's motion to reconsider the granting of a default judgment. Trial as to damages only

was to a jury, which resulted in a total award of $233,-000.00 against appellant.

Appellant's points of error one and two allege that the trial court erred and abused its discretion in entering the order of September 2, 1977, and in refusing to set it aside.

Appellant was ordered to answer the interrogatories within 30 days from September 2nd, 1977. The last paragraph of the order reads:

> "Ordered by the court that the pleadings of Defendant, Southern Pacific Transportation Company, shall be struck and Defendant, shall not be permitted to present any grounds of defense if Defendant fails to file its answers to these interrogatories by such date." (thirty days from September 2nd).

The order of September 2, 1977, did not impose sanctions, but placed the appellant on notice of the sanction to be imposed.

An order that is so uncertain as to require fact findings of a court or jury to determine the relief it grants is void. Hilatex, Inc., v. State, 401 S.W.2d 269, (Tex. Civ. App.—Houston 1966, writ ref. n.r.e.); 39 Tex. Jur. 2d Motions and Orders § 12 (1962). Before any sanctions could be imposed, a finding by the court would have to be made that the interrogatories were not answered within the 30 day period. In addition, depending on what transpired during the following 30 day period, the court would have to determine whether the interrogatories were answered, or whether good cause existed for failing to answer.

Since no order was entered on September 2, 1977, striking appellant's pleadings or refusing it the right to

present any ground of defense, these points are overruled.

Appellant's point of error three asserts that the court erred and abused its discretion in entering an order "striking appellant's pleadings and prohibiting it from presenting any grounds of defense." On November 29, 1978, an order was entered which stated in part, "that this court's order entered on September 2, 1977, is not set aside and that Defendant's pleadings in this cause are struck and Defendant shall not be permitted to present any grounds of defense." This order was legally sufficient to impose the sanctions promised in the September 2, 1977, order.

Throughout the proceedings, appellant never alleged that the interrogatories were not answered because of mistake, lack of information, lack of notice, or even neglect. The only inference which can be drawn is that its failure to answer was willful.

Rule 168, T.R.C.P. states:

> "If a party, except for good cause shown, fails to serve answers to interrogatories, the court in which the action is pending may, on motion and notice, make such orders as are just, including those authorized by paragraph (c) of Rule 215a.

Rule 215a(c), T.R.C.P. provides that the court may

> ". . . strike out all or any part of the pleading of that party (failing to answer), or dismiss the action or proceeding or any part thereof, or direct that such party shall not be permitted to present his grounds for relief or his defense, or enter a judgment by default against that party, or make other orders with respect thereto as may be just."

The only limitation imposed on the court in these two rules is that that the order must be just. Just is defined as "Conforming to or consonant with, what is legal or lawful, legally right; Reasonable. Right; in accordance with law and justice." Black's Law Dictionary, Fourth Edition. The statute makes such sanctions of striking pleadings and not allowing a party to present a ground of defense legal, therefore, the only concern is whether these sanctions were reasonable. Appellant contends that since discovery was eventually made and since it is a settled principle in Texas that the purpose of sanctions under Rule 215a(c) is to secure compliance with the discovery rules and not to punish, that there was no valid reason for invoking sanctions. We disagree.

Appellee's interrogatories were not answered until almost six months (March 31, 1978) after the time had expired under the order of September 2, 1977. The answers revealed that the motorcar, on which the deceased was riding at the time of his death, had been dismantled.

Appellee contends that the failure of appellant to timely answer the interrogatories and the dismantling of the motor car prevented her from proving, and deprived her of the right to attempt to prove, that the motorcar was defective. Appellant contends that the motorcar was scrapped on June 18, 1976, which was before notice was given that appellee was making a claim for the death of her husband. Neither the determination of whether the motorcar was scrapped before the interrogatories were propounded, nor the fact that the interrogatories were eventually answered is determinative of whether the sanctions imposed were just. All of the evidence must be considered.

The November 29, 1978, order was entered after the trial court had considered the events which had occurred from the beginning of the suit until that date, which was approximately two weeks before trial. On that date appellant still had not completed its answers to the interrogatories filed by appellee nearly seventeen months earlier.

The choice of the appropriate sanctions is for the trial court, rather than the appellate court, and as long as such sanctions are within the authority vested in the trial court, they will not be overturned unless they constitute a clear abuse of discretion. U. S. Leasing Corp. v. O'Neill, Price, Anderson & Forchard, Inc., 553 S.W.2d 11 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

In our case the court could have concluded that there was a willful failure to make discovery or that appellant was acting in bad faith for the purpose of obstructing the discovery process. Although many cases hold that the primary purpose of sanctions is to insure that discovery is accomplished rather than to punish; Young Companies, Inc. v. Bayou Corporation, 545 S.W.2d 901 (Tex. Civ. App. Beaumont 1977, no writ); Ebeling v. Gawlik, 487 S.W.2d 187 (Tex. Civ. App. Houston [1st Dist.] 1972, no writ), the abuse of the discovery rules has caused a trend in federal and state courts toward using sanctions to deter violations of the rules by other litigants. See "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions," 91 Harv. L. Rev. 1033 (1978). In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747, a federal district court dismissed plaintiff's cause of action for failing to timely file interrogatories. The Supreme Court of the United States, upholding this order said,

> ". . . the most severe in the spectrum of sanctions (dismissal or default) provided by the statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in absence of a deterrent."

Where there has been a willful refusal to allow discovery after being ordered to do so by the court, appellate courts have upheld severe sanctions by the trial court. G-K Properties and Genesco, Inc. v. Redevelopment Agency of the City of San Jose, 577 F.2d 645 (9th Cir. 1978) (dismissal of action after plaintiff failed to answer interrogatory), Harold Affonets v. Merrill Brothers, 547 F.2d 138 (1st Cir. 1977) (defendant defaulted after repeated orders of the court to answer interrogatories), Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273 (Tex. Civ. App.—Texarkana 1978, no writ) (default judgment as to liability and for damages as pled, without proof); Ramsay v. Santa Rosa Medical Center, 498 S.W.2d 741 (Tex. Civ. App.—San Antonio 1973, cert. den. for want of jurisdiction, 94 S.Ct. 3062 (dismissal of plaintiff's cause of action), Thomas v. Thomas, 446 S.W.2d 590 (Tex. Civ. App. Eastland 1969, writ ref'd, n.r.e.) (default judgment for plaintiff where defendants refused to appear for deposition).

The facts in our case, more so than in any of the ones cited above, show a necessity for prompt answers to interrogatories.

Under the circumstances, the trial court did not abuse its discretion by striking the appellant's answer, and by refusing to allow it to present its grounds of defense, or by failing to set aside its previous order.

Appellant's fourth point of error alleges the trial court erred and abused its discretion in granting appellee's motion for interlocutory default judgment.

This motion was heard approximately one week before trial. The court had before it all of the evidence, up to that time, concerning the refusal of appellant to make prompt discovery, as well as the discovery which had been effected. Only six days before, appellant finally completed and tendered the remaining answers to interrogatories propounded over seventeen months earlier. The court had the authority to determine whether the sanctions previously imposed were sufficient or whether justice under the circumstances required an additional sanction. The specific sanctions which a trial court may impose under 215(c) are necessarily cumulative and not alternative as urged by appellant. The imposition of one is not a bar to the imposition of another. The record is such that the court could have concluded that the appellant's course of conduct prevented appellee from proving her cause of action, therefore, appellee should not be required to prove liability. This was not an abuse of discretion.

Appellant's final point of error asserts that the trial court erred and abused its discretion in overruling appellant's motion for reconsideration of the court's prior orders striking appellant's pleadings, prohibiting it from presenting any ground of defense, and granting an interlocutory default judgment.

This motion was heard and denied on December 11, 1978, one day before trial. The motion reiterated the history of the events leading to the sanctions and urged the court to set aside the sanctions. There is no record

of any evidence being offered except an unsworn statement of E. W. Buckles stating that the motorcar was dismantled on June 18, 1976. The court did not err in refusing to set aside the sanctions imposed.

We initially overruled appellant's motion to include the depositions in the record, but after reconsideration allowed them to be filed. A review of the record, including the depositions, shows that the trial court could have concluded that the conduct of appellant was willful, in bad faith and that such conduct resulted in prejudice to the appellee. No abuse of discretion is shown.

The judgment is affirmed.

/s/ JAMES F. WARREN
Associate Justice

Associate Justices Peden and Evans also sitting.

Judgment rendered and opinion filed October 25, 1979.

APPENDIX B

TRIAL COURT'S ORDER OF SEPTEMBER 2, 1977

NO. 1,124,909

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

VIOLET JO EVANS, TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

ORDER

BE IT REMEMBERED that on the 22nd day of August, 1977, in the above entitled and numbered cause, came on for hearing Motion to Compel Answers to Interrogatories And For Other Relief with due and proper notice to all Parties, and thereupon came Plaintiff, by and through Plaintiff's attorneys of record, and came not Defendant, by and through Defendant's attorneys of record, and same Motion having been duly presented, heard and considered by the Court, the Court is of the opinion that the Motion should be granted. It is therefore

ORDERED by the Court that Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall file its Answers to Plaintiff's Interrogatories within thirty (30) days from the date this Order is signed; and it is further

ORDERED by the Court that the pleadings of Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall be struck and Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall not be permitted to present any grounds of defense if Defendant fails to file its Answers to these Interrogatories by such date.

DONE, SIGNED AND ENTERED on this 2nd day of September, 1977.

/s/ GEORGE E. MILLER
Judge Presiding

APPROVED:

SCHMIDT & MATTHEWS

By: /s/ JAMES H. BRANNON
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Telephone: 223-4466
Attorneys for Plaintiff

APPENDIX C

TRIAL COURT'S ORDER OVERRULING DEFENDANT'S MOTION TO SET ASIDE ORDER STRIKING PLEADINGS

NO. 1,124,909

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
113th Judicial District

VIOLET JO EVANS, TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

ORDER OVERRULING DEFENDANT'S MOTION TO SET ASIDE ORDER STRIKING PLEADINGS

BE IT REMEMBERED that on the 27th day of November, 1978, came on to be heard Defendant's Motion to Set Aside Order Striking Pleadings and Response to Defendant's Motion To Set Aside Order Striking Pleadings and came the parties by and through their attorneys of record, and the Court, having duly considered the pleadings on file, the depositions and other discovery on file in the cause, authorities and the arguments of counsel, is of the opinion that the following Order should be entered. It is accordingly

ORDERED, ADJUDGED AND DEGREED that Defendant's Motion to Set Aside Order Striking Pleadings is overruled, that this Court's Order entered on September 2, 1977 is not set aside and that Defendant's pleadings in this cause are struck and Defendant shall not be permitted to present any grounds of defense in this cause.

To all of which Order and Judgment of this Court the Defendant duly excepted and gave Notice of Appeal to the Court of Civil Appeals.

SIGNED ON THIS 29th day of November, 1978.

/s/ GEORGE E. MILLER
Judge Presiding

APPROVED:

SCHMIDT & MATTHEWS

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Telephone: 713/652-8700
ATTORNEYS FOR DEFENDANT

APPENDIX D

JUDGMENT OF COURT OF CIVIL APPEALS

BE IT REMEMBERED

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1979, present TOM F. COLEMAN, Chief Justice, and Associate Justices PHIL PEDEN, FRANK G. EVANS, HENRY E. DOYLE, JAMES P. WALLACE and JAMES F. WARREN.

In the cause SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellant, No. 17427

vs.

From Harris County

Tr Ct #1,124,909

VIOLET JO EVANS, INDIVIDUALLY & TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED, Appellee the following judgment was rendered October 25, 1979:

"This cause, being an appeal from the judgment rendered and entered by the court below on December 27, 1978, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Violet Jo Evans, Individually and as Temporary Administratrix of the Estate of Paul

David Evans, Deceased, and as the legal and personal representative of Sandra Coker, Janice Cain, Paul David Evans, Jr., and Brenda Evans, do have and recover of and from the appellant, Southern Pacific Transportation Company, and its surety, Fidelity and Deposit Company of Maryland, the sum or sums adjudged to them, together with the legal rate of interest from the date of the trial court judgment, until paid, and all their costs incurred, both in this Court and in the court below.

It is further ordered that this decision be certified below for observance. Judgment rendered by panel consisting of Justices Peden, Wallace and Warren."

I, MARIBELLE REICH, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of a judgment rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 16, Page 333.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 18th day of September, A.D. 1980.

/s/ MARIBELLE REICH
Clerk

APPENDIX E

ORDER OF COURT OF CIVIL APPEALS OVERRULING MOTION FOR REHEARING

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1979, present TOM F. COLEMAN, Chief Justice, and Associate Justices PHIL PEDEN, FRANK G. EVANS, HENRY E. DOYLE, JAMES P. WALLACE and JAMES F. WARREN.

In the cause, SOUTHERN PACIFIC TRANSPORATTION COMPANY, Appellant, No. 17427.

v.

From Harris County

Tr Ct #1,124,909

Opinion by WARREN, AJ

VIOLET JO EVANS, INDIVIDUALLY & TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED Appellee, the following order was entered November 9, 1979:

"It is ordered that appellant's motion for rehearing be overruled."

I, MARIBELLE REICH, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing

is a true copy of an ordered entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 16, Page 346.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 18th day of September, A.D. 1980.

/s/ MARIBELLE REICH
Clerk

APPENDIX F

ORDERS OF THE SUPREME COURT OF TEXAS REFUSING APPLICATION FOR WRIT OF ERROR AND OVERRULING MOTION FOR REHEARING

IN THE SUPREME COURT OF TEXAS

No. B-9075 May 28, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY

vs.

VIOLET JO EVANS ET AL

From HARRIS County,

FIRST District.

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant Southern Pacific Transportation Company, and its surety Fidelity and Deposit Company of Maryland, pay all costs incurred on this application.

No. B-9075 June 25, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY

vs.

VIOLET JO EVANS ET AL

From HARRIS County,

FIRST District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby ceritfy that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 17th day of September, 1980.

GARSON R, JACKSON, Clerk

By /s/ RICHARD P. BRAUN, Deputy.
Richard P. Braun

CERTIFICATE OF SERVICE

I, Ben G. Sewell, a member of the Bar of this Court, do hereby certify that on September 23, 1980, three (3) copies of the foregoing Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to W. Douglas Matthews and James H. Brannon, counsel of record for Respondents, at Schmidt, Matthews & Brannon, 810 Houston Bar Center Bldg., 723 Main Street, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

BEN G. SEWELL